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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DISABILITY RIGHTS OREGON,
METROPOLITAN PUBLIC DEFENDER
SERVICES INC., and A.J. MADISON,

Plaintiffs,

vs.

JAMES SCHROEDER, in his official
capacity as head of the Oregon Health
Authority, and DOLORES MATTEUCCI, in
her official capacity as Superintendent of the
Oregon State Hospital,

Defendants,

and

JAROD BOWMAN, JOSHAWN
DOUGLAS-SIMPSON,

Plaintiffs,

Case No. 3:02-cv-00339-MO (Lead Case)
Case No. 3:21-cv-01637-MO (Member Case)

UNOPPOSED MOTION FOR FURTHER
REMEDIAL ORDER

DOLORES MATTEUCCI, Superintendent of the Oregon State Hospital, in her individual and official capacity, JAMES SCHROEDER, Direction of the Oregon Health Authority, in his official capacity, and PATRICK ALLEN in his individual capacity,

Defendants,

Case No. 3:21-cv-01637-MO (Member Case)

LR 7-1 Certification

Undersigned counsel for the Plaintiffs hereby certifies that Plaintiffs have conferred with counsel for all Amici and Defendants prior to bringing this motion. All interested parties participated in good faith in multiple settlement conferences to discuss the issues presented here with the assistance of the Honorable Stacie Beckerman and the Court's neutral expert, Dr. Debra Pinals. Counsel for all the interested parties and their clients have given invaluable assistance by expressing their concerns and worked tirelessly to assist Plaintiffs in crafting a remedial order that addresses those concerns while recognizing the limitations of our practical abilities as a community and the imperative of compliance with the permanent injunction. As a result of those efforts, neither Defendants nor any Amici will file an opposition to the proposed amendments to the remedial order the motion requests. The Amici Judges stand on their prior briefing and do not take a position on the motion itself.

Motion

Plaintiffs hereby move this Court for a further remedial order, amending the September 2022 order, and adding further modifications as follows:

- a. **Admission Limits.** For persons found unable to aid and assist whose most serious charge is a misdemeanor, commit to the custody of the Superintendent of OSH for

restoration only those persons charged with a “person misdemeanor.” For purposes of this Order, “person misdemeanor” includes those crimes listed in OAR 213-003-0001(15), violation of an Extreme Risk Protective Order entered under ORS 166.525 et seq., and violation of any of the following in proceedings to impose punitive sanctions for contempt: 1. a Family Abuse Prevention Act Restraining Order entered under ORS 107.700 et seq.; 2. an Elderly Persons and Persons with Disabilities Abuse Prevention Act Restraining Order under ORS 124.005 et seq.; 3. a Sexual Abuse Restraining Order under ORS 163.760 et seq.; and 4. an Emergency Protection Order under ORS 133.035.

- b. **Discharge Planning Extension.** Additional time at OSH for care coordination and discharge planning to promote and protect the health and safety of the public upon state court order for a maximum of 30 days beyond the September 1, 2022 court order timelines after opportunity for objection by defense will be available in limited circumstances, if, according to OSH, the individual cannot be placed immediately in an identified placement after a referral has been submitted to that placement, but reasonably expects to be placed within 30 days. The extension will be considered when OSH receives any such court order at least 5 business days prior to the expiration of the restoration time period, or within 5 business days of entry of the remedial order if less than 5 days remain until expiration of the restoration time period at the time of entry of the remedial order. Failure to coordinate discharge planning by the CMHP will not constitute justification for this extended discharge planning exception.

- c. **Competency Opinion Clarifications.** If the defendant is under a competency restoration order, at the time of subsequent statutory forensic evaluations, the forensic evaluator shall notify the court that (A) the defendant has present fitness to proceed; (B) there is no substantial probability that, in the foreseeable future, the defendant will gain or regain fitness to proceed and whether there is no substantial probability that, within the allowable commitment period for restoration at OSH, the defendant will gain or regain fitness to proceed; or (C) there is a substantial probability that, in the foreseeable future, the defendant will gain or regain fitness to proceed and whether there is a substantial probability that, within the allowable commitment period for restoration at OSH, the defendant will gain or regain fitness to proceed. If the probability exists, the superintendent or director shall give the court an estimate of the time in which the defendant, with appropriate treatment, is expected to gain or regain fitness to proceed.
- d. **Extending Duration of Hospital Restoration for Violent Felonies.** Upon notice from OSH that a defendant is reaching the end of their restoration period (and such notice shall be provided at least 60 days prior to the end of their restoration period), a district attorney may petition for an exception to the maximum time for inpatient restoration established by the September 1, 2022 court order. The petition shall be signed by the district attorney for the county and submitted within 30 days of receipt of the notice of discharge (or within 30 days of entry of the remedial order if less than 30 days remain until expiration of the restoration time period at the time of entry of the remedial order), and OSH must receive any

order from the committing court prior to the expiration of the restoration time period (or within 30 days of the filing of the petition if less than 30 days remain until expiration of the restoration period at the time of entry of the remedial order).

The court may grant the petition if it determines the following:

- (1) The defendant is charged with a “violent felony” pursuant to ORS 135.240(5),¹
- (2) By clear and convincing evidence, there is a danger of physical injury or sexual victimization to the victim or a member of the public if the defendant is discharged from the Oregon State Hospital,
- (3) The defendant meets the requirements of ORS 161.370(3), and
- (4) The court concludes that there is a substantial probability that continued commitment at OSH will lead to a determination that the defendant has gained or regained fitness to proceed within that six month extension. In making this determination, the court shall consider the following:
 - a) clinical data of progress toward restoration,

¹ “Violent felony” means a felony offense in which there was an actual or threatened *serious physical injury* to the victim, or a felony sexual offense. A *serious physical injury* means a physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss of impairment of the function of any bodily organ. ORS 161.015(8)

- b) evidence that the defendant's inability to aid and assist is not due to a condition that is unlikely to result in restoration such as a significant neurocognitive disorder (e.g., dementia or traumatic brain injury), or significant neurodevelopmental disability disorders,
- c) evidence regarding the outcome of prior efforts at restoration, and
- d) any other relevant information the court wishes to consider.

If the court grants a petition, the court shall conduct a review of the status of restoration efforts at intervals no greater than every 180 days in accordance with 161.371. At such reviews, the court may continue the commitment for an additional 180 days if it makes the findings outlined above. The maximum total amount of commitment time shall not exceed the time period set by ORS 161.371(5).

OSH shall track the patients who are eligible for this exception by notice from the Oregon Judicial Department and shall track those for whom such exception has been requested and those who have been found by courts to fall within this exception and shall report aggregate data at least every two weeks on their data dashboard website.

- e. **Supremacy Clause Disputes.** If OSH identifies a conflict between the September order and the committing jurisdiction's order during the pendency of the September order, the parties to the criminal case and an OSH representative (and its counsel) are encouraged to participate in an expedited mediation (by video or

phone, if necessary) with U.S. Magistrate Judge Stacie Beckerman, to resolve the conflict. OSH and the parties to the criminal case should meet and confer prior to the mediation in an effort to resolve any conflict between the court orders and clarify the issues subject to mediation. If any party to the criminal case refuses to participate in mediation or if mediation is unsuccessful, any *Mink/Bowman* party may petition this Court for an expedited ruling on whether the Supremacy Clause establishes that this order takes precedence over the conflicting state court order, and any responses from the parties or amici shall be filed within five business days.

- f. **Implementation:** To the extent that aspects of the remedial order require updated forms and protocols by OHA, OSH, and amici, these updates shall be made and with the assistance of amici and the parties, and there shall be up to a 30-day period from the date of the order to implement any such changes to relevant forms and to notify stakeholders impacted by these changes.

Plaintiffs further request that, should the Court be willing to enter this order, the Court cancel the hearing on the transport issues currently scheduled for Thursday, June 29, based on the agreed provision in paragraph (f), and grant the Defendants' Unopposed Motion to Amend the September 1 Order (Dkt. No. 367).

Memorandum

Defendants remain out of compliance with the permanent injunction, making this Court's authority to issue remedial orders designed to bring them into compliance clear. *Stone v. City & County of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992). The difficulty is determining what is the "least intrusive means" of achieving that goal. *Id.* at 861 This Court granted Plaintiffs'

motion in September 2022, issuing a remedial order that it determined at that time was the least intrusive means of achieving compliance. *See* Dkt. No. 271. In response to that order, several groups of stakeholders appeared in the case as amici, urging the Court to reconsider and suggesting that the Court had not chosen the least intrusive means. *See, e.g.*, Dkt. No. 274, 276, 284. The Court upheld its order over those objections. Dkt. No. 338. Recognizing that the September 2022 order, standing alone, was unlikely to be sufficient to bring the Defendants into compliance and that further remedial efforts were likely necessary, the parties and amici entered into a series of structured discussions, assisted by Honorable Stacie Beckerman and the Court's neutral expert, Dr. Debra Pinals.

This further proposed remedial order outlined above is the product of those discussions. It seeks to strike a balance between addressing the concerns raised by amici about the effects of the September 2022 remedial order and the continuing need to move the Defendants into compliance. It addresses those concerns by creating two exceptions to the timelines imposed by the September 2022 order: one short extension available for discharge planning, and one narrow extension available for the small number of patients for whom there is a serious risk to public safety, they are charged with violent crimes, and the extension is likely to lead to their restoration. The basic premise at the heart of the proposed order is that the "cost" in terms of beds created by these narrow exceptions to the timelines will be offset by a new restriction which prevents the hospital from admitting patients who are charged only with non-person misdemeanors. The hope is that, on balance, the "savings" in terms of beds will be a net

positive—that the exceptions will be used rarely and the Defendants will continue to make progress toward compliance.²

No one knows whether that hope will be realized. There are simply too many unknowns to accurately predict. This proposal is guided by the expertise of the Court’s expert and extensive input for a variety of stakeholders from the amici. It is the Plaintiffs’ best attempt at proposing to the Court a remedial order that fulfills the Court’s obligation to require compliance with its injunction but using the least intrusive means of achieving that compliance. Everyone involved in these discussions understands that it may not work as intended. That is why the proposed order also contains requirements of monitoring and reporting. The Court can expect that, if things do not go as planned, the parties will return to the Court asking for modifications to the order. This is built in to the structure of the order by design. While we have done our best to craft a proposal that is likely to be successful, the Court should expect requests for modification in the future.

DATED this 26th day of June, 2023.

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² Plaintiffs are also hopeful that other changes to these systems—changes that are a direct result of these discussions but not requiring a remedial order from the Court—will also yield positive progress toward compliance.

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